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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1757

FEDERAL ELECTRIC CORPORATION, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY BRIEF FOR PETITIONER

Petitioner, Federal Electric Corporation, hereby respectfully replies to the brief for the United States in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Claims in this proceeding. Pursuant to Rule 24, this reply is limited exclusively to issues and/or arguments raised for the first time by respondent in its brief.

1. Respondent misstates the central question presented in this proceeding. The question is *not* whether petitioner's contract with the Government "was enforce-

able by the Government as to the additional purchases" above the minimum quantity set forth in the contract. Because of *Willard, Sutherland & Co.* v. *United States,* 262 U.S. 489 (1923), the Court of Claims never directly confronted the enforceability issue.[1] Rather, the question presented here is whether, contrary to the decision of the Court of Claims in this case, the Uniform Commercial Code (UCC) is the federal law applicable to disputes under Government contracts in the absence of otherwise applicable federal regulations, as has been held by the Court of Appeals for the Second Circuit and other federal courts.

It is important for this Court to resolve the serious conflict in the law which has resulted from the Court of Claims' interpretation of this Court's *Willard, Sutherland* decision. As described more fully in the Petition at pages 8-22, that conflict has created substantial confusion and uncertainty as to the function of the UCC in resolving Government contract disputes. Resolution of the conflict is essential to protect the Government and its contractors—as well as the federal courts—from the multiplicity of litigation which inevitably results from confusion with respect to the applicable law.

Respondent asserts that the Court of Claims unanimously rejected petitioner's contention that the contract was unenforceable (Br. in Opp., p. 4). The court did no such thing. Actually, the court refused to follow the Board on the legal issues and refused to decide whether or not the contract was enforceable (Pet. App. A, p. 7a). The court decided the case on entirely different grounds than the Board, albeit erroneously. The court stated:

> In deciding for the Government with regard to the enforceability of the FEC contract, *we depart from* the Board's reasoning. [Pet. App. A, p. 6a; emphasis added.]

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[1] The court stated: "We deem it unnecessary to resolve the issue of enforceability *ab initio* . . ." (Pet. App. A, p. 7a)

2. Respondent argues that there is no conflict between the decision of the Court of Claims in this proceeding and prior decisions of that court and of the United States Court of Appeals for the Second Circuit. Yet, respondent describes the conflict in its brief and the uncertainty and confusion in the law created by the Court of Claims decision. Respondent acknowledges that the Court of Claims declined to follow the modern trend of its own decisions and the decisions of other federal courts, including the Second Circuit. Those decisions recognized the applicability of the Uniform Commercial Code to the resolution of Government contract disputes in the absence of otherwise applicable federal procurement regulations. The UCC is the "federal common law" of contracts. *See* the discussion of Supreme Court and Court of Claims cases and cases from the Second, Fifth and Seventh Circuits, all supporting this principle, on pages 12-16 of the Petition.

Despite the recent trend of its own decisions and the unanimous authority of other federal courts, the Court of Claims reluctantly held that UCC § 1-207 could not be applied to petitioner's action in this case. UCC § 1-207 [2] permits "performance under protest" and effectively complements the modern Disputes clause mandatorily inserted in Government contracts. However, the court below felt compelled to follow this Court's 1923 decision in *Willard, Sutherland & Co.* v. *United States, supra,* which held that an indefinite quantity Government contract was enforceable to the extent it was performed, *regardless of a prior protest.*

Willard, Sutherland was rendered by this Court more than 50 years ago, some 30 years before the publication of the first edition of the UCC by the American Law Institute in 1952. The contract in *Willard, Sutherland* did not contain a Disputes clause. The Court of Claims recognized

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[2] UCC § 1-207 provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved . . . ."

that it was faced with the Hobson's choice of either following an "elderly" Supreme Court precedent and thereby creating a conflict in the law, or following the "contemporary view" of performance under protest in UCC § 1-207 at the risk of undermining the authority of a Supreme Court decision. The court stated:

> Though we might find persuasive the contemporary view of performance under protest as restated in Section 1-207 of the Uniform Commercial Code and accepted by the court under the special circumstances of the *Northern Helex* case, we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court. We are reminded in this connection of the Court's recent expression of "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of [the Supreme] Court." *United States* v. *Mason*, 412 U.S. 391 (1973). [Pet. App. A, pp. 9a-10a]

Thus, respondent's argument that there is no conflict here is wide of the mark. The Court of Claims itself recognized that such a conflict did, in fact, exist. The conflict here is one between the pre-UCC law as stated by this Court in *Willard, Sutherland* (and adopted by the court below in this case) and the current law as reflected in the UCC, prior Court of Claims decisions and the decision of the Second Circuit in *United States* v. *Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966). It is now critical to the efficient administrative and judicial resolution of disputes under Government contracts that this Court act promptly to dispel the confusion and uncertainty regarding the applicability of the UCC to such disputes.

3. Respondent argues that petitioner did not rely upon the Uniform Commercial Code in support of its case before the Armed Services Board of Contract Appeals (ASBCA) or in the Court of Claims. In fact, petitioner did advise respondent that the contract was unenforceable, rescinded the contract, but agreed to perform under protest at

respondent's insistence. It was clear to the Court of Claims that petitioner was following UCC § 1-207 without calling it by name.

Moreover, the Disputes clause in petitioner's contract specifically required performance under protest, as permitted by the UCC. The Court of Claims recognized this in its opinion where the court held that regardless of the UCC and the Disputes clause in petitioner's contract, performance under protest was not permissible here because of this Court's decision in *Willard, Sutherland.*

Although the Court of Claims failed to recognize the paramount importance of the Disputes clause in this proceeding, it has in the past acknowledged that the presence of a Disputes clause in a contract makes the UCC "performance under protest" rule applicable, and renders inapplicable on its facts *Willard, Sutherland* and other early cases. On analogous facts in *Dynamics Corp.* v. *United States,* 182 Ct. Cl. 62, 77-78, 389 F.2d 424, 432-33 (1968), the Court of Claims considered the Government's argument that the contractor is not obligated to perform. Relying on *Willard, Sutherland* and other cases, the Government contended that the contractor had waived its right to recover by performing. Rejecting that argument, the Court of Claims stated:

> *The problem with defendant's argument is that it overlooks the clear mandate of the disputes clause,* which reads as follows:
>
> > Pending final decision of a dispute hereunder, the Contractor shall proceed and in accordance with the Contracting Officer's decision.
>
> *It is the absence of such a clause which distinguishes the earlier cases cited by defendant from the instant case.*
>
> • • • •
>
> In short, *the disputes clause in the instant case compelled plaintiff to comply with defendant's directions, and plaintiff's delivery of goods under protest did not*

> *act to deprive plaintiff of its right to recover beyond the terms of the contract.* [Emphasis added.]

The Court of Claims in *Dynamics* also noted, correctly, that the Disputes clause in Government contracts "protects an important interest of the Government" in obtaining needed supplies and equipment, despite contractual disputes. It would "defeat the salutary purpose" of the clause if Government contractors such as petitioner were required to refuse to continue performance in order to preserve their contract rights (182 Ct. Cl. at 78, 389 F.2d at 433). This is exactly what the Court of Claims would require petitioner to do on the basis of *Willard, Sutherland* and what respondent now proposes to the Court.

4. Finally, respondent argues that this case is not distinguishable on its facts from *Willard, Sutherland* because, although petitioner's contract contained a Disputes clause, the dispute in this case was not subject to the clause. This argument is exemplary of respondent's effort to shift the focus of attention in this Court from the serious issues raised in the Petition. Throughout the long course of the administrative and judicial proceedings in this case respondent never questioned the applicability of the Disputes clause, and the jurisdiction of the ASBCA thereunder. Respondent did not allege in the Court of Claims that the Board lacked jurisdiction of the case but rather sought affirmance of the Board decision. The court also did not question the jurisdiction of the Board under the Disputes clause.

Respondent's assertion that the Disputes clause is not applicable to this dispute reflects a misunderstanding of the disputes procedure. The narrow interpretation of the Disputes clause which respondent proposes is entirely inconsistent with this Court's interpretation of the clause in *United States* v. *Utah Constr. Co.*, 384 U.S. 394 (1966), and *United States* v. *Carlo Bianchi & Co.*, 373 U.S., 709 (1963). *See Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 757, 763-64, 345 F.2d 833, 837 (1965).

CONCLUSION

In summary, respondent has attempted in its brief in opposition to the Petition to shift the attention of the Court from the serious issues raised in the Petition. Respondent on the one hand seeks to apply the legal conclusions of the Board which were specifically rejected by the Court of Claims, and on the other hand to claim that the Disputes clause was inapplicable and that the Board lacked jurisdiction over the case.

The real issues here are clearly apparent from a reading of the Court of Claims decision. They involve the role of the UCC in resolving Government contract disputes in the absence of otherwise applicable federal statutes and regulations. They pose the question of the vitality of this Court's 1923 decision in *Willard, Sutherland* in the present UCC environment. It is these issues which have created the conflict between the decision of the Court of Claims in this proceeding and the decisions of other federal courts, including the Second Circuit, and the consequent uncertainty and confusion in the law and which only this Court can resolve.

WHEREFORE, for the foregoing reasons and for the reasons set forth in the Petition, a writ of certiorari should be issued to review the decision of the Court of Claims in this proceeding.

Respectfully submitted,

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